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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-237

COMMENTS OF U S WEST, INC.

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SUMMARY

In these Comments, U S WEST, Inc. ("U S WEST") responds to the Federal Communication Commission's ("Commission") Notice of Proposed Rulemaking ("Notice") implementing the infrastructure sharing provisions of the Telecommunications Act of 1996 (Section 259). U S WEST reads this Section of the Act as enabling small rural local exchange carriers ("LEC") to obtain access to modern telecommunications infrastructure in order to provide their customers with modern services prior to the time when competitive market forces would normally make such services available. Infrastructure sharing rights are available only to "qualifying carriers," providers of universal service who lack economies of scale and scope. As such, it is a fairly limited statutory provision.

U S WEST's comments focus largely on Section 259(b)(6) of the Act, which prohibits the Commission from requiring incumbent LECs to share infrastructure with qualifying carriers who plan to use this infrastructure to compete with the incumbent LEC. This Section is key to proper understanding and implementation of the infrastructure sharing provisions of the Act. In essence, it ensures that the infrastructure sharing provisions will indeed be limited in nature and scope, and that they will ultimately be replaced by competitive market forces (and other statutory sharing and access obligations of carriers imposed elsewhere in the Act). The Commission's Rules must be tailored to permit infrastructure sharing agreements to be terminated with relative ease whenever appropriate because of the development of competition.

U S WEST also recommends that the Commission not enact detailed infrastructure sharing rules. For the most part, simple restatement of the statute should suffice. The Act clearly contemplates that infrastructure sharing should be handled via negotiations between carriers, not pursuant to detailed rules. For example, non-discrimination and other common carrier-like obligations should not be imposed on parties sharing infrastructure under this Section of the Act. However, the Notice's proposal to treat all infrastructure sharing as interstate in nature and subject to the Commission's jurisdiction appears to be correct.

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U S WEST, Inc. hereby files its comments on the Notice in the above-captioned docket.[1]

I. INTRODUCTION

The Notice seeks comment on the best means of implementing Section 259 of the Telecommunications Act of 1996.[2] Section 259 is intended to provide access to modern telecommunications services to those to whom competitive market forces would not make those services available -- at least as rapidly as market forces will make them available in most of the country. U S WEST does not anticipate that there will be a large number of infrastructure sharing requests or arrangements, at least outside of the country's most rural areas. Section 259 also envisions that

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[1] In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, CC Docket No. 96-237, Notice of Proposed Rulemaking, FCC 96-456, rel. Nov. 22, 1996 ("Notice").

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("Telecommunications Act" or "Act").

most, if not all, infrastructure sharing arrangements will be treated through private negotiations. The Act does not grant to the Commission the power or the duty to regulate these agreements in detail. Moreover, the Act does not appear to exempt from antitrust liability carriers who enter into what could, if carriers are not careful, amount to direct agreements not to compete with each other. This means that carriers must be permitted maximum flexibility to terminate infrastructure sharing arrangements wherever competition between the signators is actual or imminent.

Essentially, the Act permits a "qualifying carrier" -- i.e., a provider of universal service which lacks economies of scope and scale -- to negotiate with incumbent local exchange carriers ("LEC") for the purchase or sharing of "public switched network infrastructure, technology, information, and telecommunications facilities and functions" to be used in the provision of telecommunications service and information access.[3] Generally, a qualifying carrier will also be an incumbent LEC. The Commission must enact rules setting the general parameters of such negotiations, but may not require incumbent LECs to enter into any infrastructure agreement which is economically unreasonable or contrary to the public interest. The Commission likewise may not order infrastructure sharing which permits the qualifying carrier to use shared infrastructure to compete with the incumbent LEC in geographic areas where the incumbent LEC provides exchange service or exchange access. In addition, such infrastructure sharing cannot result in

[3] 47 USC § 259(a).

classification of the incumbent LEC as a common carrier in the provision of public switched network infrastructure to the qualifying carrier. The Act specifically does not change application of the antitrust laws.[4]

U S WEST reads this Section of the statute as far less complex than does the Commission in the Notice. We submit that the infrastructure sharing Section of the Act is primarily hortatory in nature, encouraging incumbent LECs and small qualifying carriers to share relevant infrastructure in those geographic areas where they do not compete -- and where they have no plans to compete. The Commission's task is to establish an atmosphere conducive to such negotiations. The Commission is also tasked, of course, with intervening in the event that an incumbent LEC or a qualifying carrier is behaving in a demonstrably unreasonable manner. However, the detailed regulations proposed in the Notice go considerably beyond what needs to be adopted to respond to this statutory mandate. U S WEST submits herein that the Commission's regulatory structure implementing Section 259 should be minimalist in nature and should focus on several key aspects of the statute, rather than attempting to develop detailed rules to govern a process which should be expected to function optimally through negotiations, not regulations.

[4] See Telecommunications Act § 601(b)(1).

II. THE STATUTORY INFRASTRUCTURE SHARING PROVISIONS DO NOT REQUIRE AN INCUMBENT LEC TO SHARE INFRASTRUCTURE WITH ITS ACTUAL OR POTENTIAL COMPETITORS

Section 259(b)(6) provides that the Commission's Rules implementing Section 259 shall:

> not require a local exchange carrier to which this section applies to engage in any infrastructure sharing agreement for any services or access which are to be provided or offered to consumers by the qualifying carrier in such local exchange carrier's telephone exchange area.[5]

We submit that this Section is crucial to a proper understanding and implementation of Section 259.

As a general principle, the Act envisions the advancement of competition into all local exchange areas -- including, ultimately, those in the most remote and rural parts of the country. The Act provides a specific vehicle whereby competitors can purchase facilities and services from each other.[6] Section 259, on the other hand, provides for a type of facilities sharing and dedication in which competition is expressly disclaimed -- indeed discouraged. In fact, a carrier sharing infrastructure under Section 259 has the express statutory right to demand that the qualifying carrier not use the shared infrastructure in competition with the providing carrier.[7] Several important conclusions can be drawn from this unique statutory provision.

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[5] 47 USC § 259(b)(6).

[6] See id. § 251(b)(1) and § 252(a).

[7] Section 259(b)(6) literally prevents a qualifying carrier from using Section 259 infrastructure only from competing against the incumbent LEC in the incumbent

First, the prohibition against a qualifying carrier using facilities purchased pursuant to Section 259 to compete against an incumbent LEC pretty much precludes much of the public switched network infrastructure sharing contemplated in the Notice. For example, poles, ducts, unbundled loops, etc., which are geographically located within the telephone exchange area of the incumbent LEC and are used by the incumbent LEC to provide service to its customers within that geographic area, would clearly not be purchasable under Section 259. They would, of course, be available pursuant to Section 251.

Second, the prohibition against a qualifying carrier utilizing Section 259 facilities to compete against an incumbent LEC in its telephone exchange area must apply beyond the geographic area in which the incumbent LEC operates as an incumbent LEC. The Act clearly contemplates that incumbent LECs will offer competitive exchange services in those geographic areas formerly reserved for service by a single LEC. For example, U S WEST could expand its existing local exchange operations into adjacent territory served by another incumbent LEC. In such a case the telephone exchange areas of the two LECs would overlap. The

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LEC's "telephone exchange area." As a practical matter, qualifying carriers can be prevented by an incumbent LEC from using Section 259 infrastructure to compete against the incumbent LEC anywhere. Certainly the qualifying carrier cannot use Section 259 infrastructure information or facilities anywhere outside of its own universal service telephone exchange area, and we assume that it will always be used as part of the qualifying carrier's universal service provisioning. This proposition is not remarkable or controversial. If it is argued in initial comments that a qualifying carrier can use Section 259 infrastructure to compete against the incumbent LEC in the provision of any service, U S WEST will address the question in its reply comments.

qualifying carrier could not use Section 259 facilities to provide service in the overlap area -- even though the overlap area included geographic areas where the qualifying carrier was also the incumbent LEC. In other words, as incumbent LECs expand their areas of operation and seek to bring competition to new areas served by qualifying carriers, the infrastructure sharing options available to qualifying carriers will diminish.

Third, any infrastructure sharing agreement may not involve a market allocation agreement between the incumbent LEC and the qualifying carrier. The Commission does not have the authority under the infrastructure sharing Section of the Act to permit carriers to allocate markets.[8] Thus, the Commission cannot direct carriers to enter into infrastructure agreements which could be anticompetitive. As there is no obligation outside the Act to share infrastructure, the Commission's response must be to permit carriers to terminate infrastructure agreements easily for competitive reasons. In other words, in order to give force and effect to the obligation of incumbent LECs to share infrastructure, the prohibition against rules mandating infrastructure sharing in competitive situations, and the antitrust laws, the Commission must ensure that incumbent LECs can easily terminate contracts when competition arises. As is discussed below, the approach proposed in the Notice whereby an incumbent LEC must "prove" the existence of competition would not be appropriate.[9]

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[8] See Senate Report No. 104-230 at 34.

[9] Notice ¶ 27.

III. THE COMMISSION SHOULD ADOPT VERY MINIMAL RULES TO IMPLEMENT SECTION 259

We submit that Section 259 was meant to address a very specific and limited issue -- the ability of rural telephone companies in remote areas to deliver modern telecommunications services to their customers when the modernization of their own plant necessary to deliver such services is uneconomical. Under these circumstances, the detailed rules proposed in the Notice do not seem necessary. Even such fundamental issues as what represents a "qualifying carrier" under the statute, what infrastructure must be shared, and how such terms as "economically unreasonable" are to be interpreted need not be addressed in advance. Because of the prohibition against a qualifying carrier using Section 259 facilities to compete against the provider of those facilities, and the further requirement that a qualifying carrier be involved in the provision of universal service, it would seem that cooperative arrangements such as are contemplated in Section 259 can develop with very little direct Commission oversight. If a carrier providing universal service in an area needs a facility from an incumbent LEC, it need only open negotiations, be prepared to pay a reasonable price for shared infrastructure, and be ready to abide by the competition provisions of the Act and whatever contract is negotiated. There would seem to be no reason to otherwise limit the nature of the qualifying carrier or its agreement with the incumbent LEC by rule, at least unless it were to be demonstrated that negotiations would prove fruitless.

There is simply no apparent reason why two carriers would not be motivated to work out an acceptable arrangement on their own in these circumstances. The driving force behind the Commission's desire to regulate Section 251 interconnection agreements -- the opinion that incumbent LECs will be reluctant to enter into such agreements for competitive reasons -- simply does not apply in the case of Section 259 because of the statutory prohibition against requiring Section 259 sharing being used in competitive situations.

Thus, for the most part, the Commission's Rules should simply restate the statute without further evaluation or explanation.

IV. ANY RULES ADOPTED BY THE COMMISSION MUST RECOGNIZE THE RIGHT OF INCUMBENT LECS TO TERMINATE SUCH AGREEMENTS WHEN COMPETITIVE REASONS SO DICTATE

The Notice also asks several significant questions as to other possible rule permutations arising out of the language of Section 259(b)(6) of the Act, the prohibition against competitive use of infrastructure by a qualifying carrier against the incumbent LEC which provided the infrastructure.[10] However, these questions (like the issues concerning the interplay between Sections 251 and 259 of the Act, discussed in Paragraphs 10-16 of the Notice), if answered in a manner which required an overly miserly reading of the scope of Section 259(b)(6), could ultimately turn the infrastructure sharing provisions of the Act away from their

[10] Notice ¶¶ 26-27.

purpose and into a regulatory structure which could ultimately operate to thwart competition in rural telecommunications markets.

The Notice observes that the language of Section 259(b)(6) actually prohibits the Commission from requiring infrastructure sharing for "services or access which are to be provided or offered to consumers by the qualifying carrier" in the incumbent LEC's telephone exchange area.[11] The Notice tentatively concludes that this language indicates that the only infrastructure which is subject to the prohibition against competition is comprised of actual "services or access" which the qualifying carrier would not be able to use to compete directly (presumably by resale) against the incumbent LEC.[12] The Notice confirms this position in suggesting that an incumbent LEC could terminate an infrastructure agreement only upon proving that the qualifying carrier was actually "providing or offering services or access obtained pursuant to Section 259 to consumers in the providing incumbent LEC's telephone exchange area."[13] We read this language as indicating that the Commission is proposing that a qualifying carrier be able to use Section 259 infrastructure to compete against the incumbent LEC in all other instances. We submit that such regulations would undercut the purpose of Section 259, and would ultimately be anticompetitive.

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[11] Id. ¶ 26.

[12] Id.

[13] Id. ¶ 27.

Instead, there is no compulsion (or authority) under Section 259 for any qualifying carrier to demand infrastructure from an incumbent LEC which will be utilized by the qualifying carrier to compete against the incumbent LEC. A more narrow reading of this statutory Section (to limit the prohibition against the competitive use of shared infrastructure to cases where actual shared services were resold in the incumbent LEC's local exchange area) would discourage incumbent LECs from negotiating with qualifying carriers because the shared infrastructure would become a weapon against the sharing LEC.[14] The Act's competition provisions are meant to encourage mutually acceptable agreements for infrastructure sharing to the benefit of consumers who would otherwise not be able to enjoy the benefits of modern technology brought about by opening markets and permitting development of competition. If the infrastructure sharing provisions of the Act were to be expanded to permit competitive use of shared infrastructure, incumbent LECs would be discouraged from negotiating with qualifying carriers in order to provide the broadest array of facilities useful in fulfilling the qualifying carrier's own desire to serve its own customers. In other words, the infrastructure sharing provisions of the Act must be read narrowly and in accordance with their purpose.

In this context, the Commission must be very wary of attempting to inhibit the right and ability of incumbent LECs to put proper termination language in their

[14] In fact, we submit that sharing infrastructure to be used against the sharing LEC would meet the classic definition of "economically unreasonable," thus undercutting the entire purpose of the Section.

infrastructure sharing contracts. Incumbent LECs must be permitted to insist that: 1) the agreement can be terminated by the incumbent LEC should it compete with the qualifying carrier; 2) the agreement can be terminated should the incumbent LEC seek to provide service in the area served by the qualifying carrier; 3) the agreement can be terminated should competent authority (the Commission or a state commission) determine that it is no longer in the public interest; or, 4) the agreement can be terminated by either party in the event the party reasonably determines that continuance of the agreement risks antitrust liability. In the event of termination, infrastructure can then be purchased pursuant to Section 251.

V. THE COMMISSION SHOULD NOT ADOPT NON-DISCRIMINATION RULES IMPLEMENTING SECTION 259

Section 259(b)(3) of the Act provides that an incumbent LEC will not be deemed to be a common carrier by virtue of providing infrastructure sharing with a qualifying carrier. This Section would seem to definitively preclude adoption of rules, such as prohibiting discrimination, requiring that incumbent LECs act like carriers in providing Section 259 infrastructure facilities. The Notice nevertheless asks whether other Act provisions requiring that infrastructure sharing be available to "any" qualifying carrier (Section 259(a)) and that any infrastructure sharing agreement be on "just and reasonable" terms (Section 259(b)(4)) demand some kind of rules prohibiting discrimination by an incumbent LEC in offering Section 259 facilities.[15]

[15] Notice ¶ 22.

We submit that non-discrimination rules would be inappropriate in the context of infrastructure sharing under Section 259. Even in the absence of the prohibition against classifying an incumbent LEC's sharing of infrastructure under Section 259 as a carrier service, requiring carrier status for such sharing would be superfluous. As noted above, the circumstances surrounding each infrastructure sharing arrangement are likely to be unique and driven by the prohibition against using Section 259 infrastructure to compete against the sharing carrier. As each qualifying carrier will in all likelihood be the incumbent LEC in a specific geographic locale, there are likely to be no similarly situated qualifying carriers who could command equal treatment with any other qualifying carrier, and non-discrimination rules would have no effect. Of course, the fact that carrier status is expressly prohibited by status also should weigh in the Commission's decision not to impose non-discrimination rules in the infrastructure sharing area.

VI. INFRASTRUCTURE SHARING SHOULD NOT BE DIVIDED INTO FEDERAL AND STATE COMPONENTS

The Notice tentatively concludes that infrastructure sharing arrangements should not be divided into federal and state components, and that the Act gives the Commission full authority over all elements of such sharing under the Act.[16] U S WEST agrees with the analysis in the Notice in this regard. We perceive that public switched network infrastructure made available pursuant to Section 259 will

[16] Id. ¶ 18.

consist of facilities and services used by the qualifying carrier to provide both interstate and intrastate services. These services of the qualifying carrier will be subject to regulation by the appropriate jurisdiction. There is no reasonable way to separate these facilities at the level of the transaction between the qualifying carrier and the incumbent LEC. The Notice's analysis is correct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rebecca Ward, do hereby certify that on this 20th day of December, 1996, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC.** to be served via hand-delivery upon the persons listed on the attached service list.

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